

(1932) 03 CAL CK 0004
In the Calcutta High Court

Sikharja Nath Roy Choudhury and Another	APPELLANT
Vs	
Janaki Nath Roy and Others	RESPONDENT

Date of Decision : 07-03-1932

Acts Referred:

Citation : AIR 1932 Cal 790 : 140 Ind. Cas. 457

Hon'ble Judges : Rankin, C.J;C.C. Ghose, J;C.C. Chose, J

Bench : Full Bench

Judgement

Rankin, C.J.—In my opinion, this appeal must be allowed. We have to deal with a mortgage suit which was brought in 1923 and was decreed in 1928. The amount of mortgage debt appears to have been large and appears to have doubled itself by this time. It further appears that the mortgagees have been endeavouring as best as they can to get a sale under their mortgage decree and that the mortgagors according to the evidence of the mortgagees have obstructing them with all sorts of objections in execution. Accordingly in July 1931 somebody advised the mortgagees to apply for attachment before judgment but the mortgagees at the time they did so apply had clearly no proper notion of what it was necessary to allege and prove in order to be entitled to take action under Order 38. Their complaint was really this that as regards the mortgaged properties not only were the mortgagors obstructing the mortgage sale but that in the meantime properties subject to the mortgage were being allowed to get into arrears for Government revenue and so on and properties not subject to the mortgage were being sold under other decrees. They said that in addition to that the mortgagors had been negotiating for mortgage or sale of properties not within their security. The position of course! under Order 38 is that the applicants have to show that these mortgagors have been deliberately and fraudulently effecting sales or mortgages of their other properties with the purpose of defeating any personal decree that the mortgagees may get against them. It is quite idle to say that they have suffered in invitum execution sales and they have suffered sales for Government revenue. What has to be shown is that the sales are sales made in fraud of the mortgagees in respect that the intention is that

when the mortgagees have got a personal decree that decree will be infructuous. Now, this basis of action under Order 38 was apparently not at all clear to the mind of the learned Subordinate Judge who dealt with this case. He appears to have thought that if in the meantime by reason of other execution sales a property not subject to the mortgage was lessening or depreciating in value that meant that the mortgagees were in jeopardy as regards any balance that there might be after the mortgage sale and that he was entitled to take action under Order 38 merely to secure the interest of the mortgagees. This appears in several parts of the judgment. He says:

It has been alleged on behalf of the decree-holders that some of the properties of the judgment debtors were sold and some others about to be sold and otherwise encumbered owing to the action and gross neglect of the judgment-debtors themselves which would lead to great obstacles in the way of the decree holders realizing their dues.

2. You cannot get an order under Order 38 for gross neglect. In the same way he illustrates as a typical instance in support of the applicants' allegation the case of a property sold in execution of a decree by the Khulna Loan Co. as if the fact that a man is suffering an execution sale is the same thing as voluntarily disposing of his property with a fraudulent intention and throughout the judgment one finds that the distinction is nowhere present in the mind of the learned Additional Subordinate Judge. It seems to me almost difficult on the affidavits to pretend that there is any case under Order 38. If these people have got other decrees to deal with which ought to be satisfied, their other creditors cannot be stopped from taking action in execution by these mortgagees attaching the properties. While one quite sympathizes with the laudable desire of the mortgagees to try to realize their dues by attaching other properties of the judgment debtors that is certainly not the object of the provisions of Order 38. In my judgment, this appeal must be allowed and application under Order 38 must be dismissed with costs before the learned Subordinate Judge and of this appeal. We assess the hearing-fee in this Court at five gold mohurs.

3. The Rule is discharged.

C.C. Ghose, J.

4. I agree.